No. 80572-5

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,
v.

AT & T WIRELESS SERVICES, INC.,

Petitioner.

AMICUS CURIAE BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

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I. IDENTITY OF *AMICUS CURIAE*

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has more than 2,000 members in state legislatures across the United States. Its mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public.

II. INTEREST OF *AMICUS CURIAE*

ALEC supports principles of due process of law, federalism and state sovereignty that are established in the federal and state constitutions. It believes that the states have the rightful power to protect their own citizens and to police their own jurisdictions through consumer protection and other laws. Constitutional principles forbid extraterritorial state legislation that unduly interferes with other states' exercise of their police powers. Because states stand on equal footing with each other, constitutional principles also forbid extraterritorial state legislation that unduly limits the liberty of other states' citizens.

ALEC's official policy on class actions is largely contained in its *Class Actions Improvement Act*, which establishes that plaintiff class

actions should be limited to residents of the state in which it is filed. ALEC believes states should devote their limited resources primarily to resolving claims of their own citizens.

III. STATEMENT OF THE CASE

As *amicus curiae*, ALEC adopts the Statement of the Case of AT&T Wireless Services, Inc, Petitioner.

IV. ARGUMENT

Traditional rules of American law and constitutional principles place limits on the extraterritorial reach of state laws. But in *Schnall v. AT&T Wireless Servs., Inc.*, the Washington Court of Appeals wrongly concluded that the Washington Consumer Protection Act (WCPA) governed the claims of all members of the respondent class—including California residents who entered into their respective service contracts in California. 139 Wn.App. 280, 286, 292-294, 161 P.3d 395 (2007).

Appellant persuasively speaks to the erroneous ruling of the Court of Appeals concerning choice-of-law. *See* Petition at 13-15. This brief focuses on why traditional rule of presumption against extraterritorial application of state laws and related constitutional principles require that WCPA claims do *not* apply to respondent class members who are California residents and contracted for services in California.

A. Rules of Statutory Construction Preclude Non-Washington Resident WPCA Claims for Harms Suffered by Conduct Taking Place Outside State of Washington

It is a well-established canon of construction that statutes do not apply extraterritorially absent a clear expression or evidence of intent. In the federal context, U.S. Supreme Court has declared that "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575 (1949))[1]

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[1] This "canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained." *E.E.O.C.*, 499 U.S. at 248 (quoting *Foley Bros.* 336 U.S. at 285). Furthermore, the "canon of construction," *E.E.O.C.*, 499 U.S. at 248 (internal quotation marks omitted), is "rooted in a number of considerations," *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). It "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *E.E.O.C.*, 499 U.S. at 248. In addition, it recognizes that Congress "generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5, 113 S.Ct. 1178 (1993). *See also Blackmer v. United States*, 284 U.S. 421, 437, 52 S.Ct. 252 (1932) ("While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its applications, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.")

Applying the presumption against extraterritoriality, the Ninth Circuit Court of Appeals in *ARC Ecology v. U.S. Dept. of Air Force*, observed "a slight modification of the direct statement requirement" by the U.S. Supreme Court. 411 F.3d 1092, 1097 n.2 (9th Cir. 2005) (citing *Smith*, 507 U.S. at 204). Federal courts may consider "sources other than the language of the statute itself, including the structure of the act, legislative history, and other non-textual sources." *ARC*, 411 at 1097 n.2 (citing *Smith*, 507 U.S. at 204). Historically, a few states have understood the presumption in a manner similar to ARC and Smith. *See, e.g., Harper v. Silva*,

Similarly, the high courts of the states have long held state statutes do not have extraterritorial application absent expression of intent, and that extraterritorial effect will not be found by implication. *See, e.g., Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406,434, 320 N.W.2d 843(Mich.1982) ("[i]n order for a statute to have extraterritorial application, there must be clear legislative intent"); *In re American Mut. Liability Ins. Co.*, 215 Mass. 480, 484, 102 N.E. 693 (Mass. 1915).[2] The rule is typically described as a presumption against extraterritorial application of the statute.

> [N]o legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it, and it is generally so construed.

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224 Neb. 645, 648, 399 N.W.2d 826 (Neb. 1987); *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 375-376, 94 A. 372 (Conn. 1915). *Amici* do *not* believe that non-textual sources support a construction to overcome the presumption against extraterritorial application of the CPA in the present case.

[2] *See also, e.g., Singer v. Magnavox Co.*, 380 A.2d 969, 981, Blue Sky L. Rep. P 71,399 (Del. 1977) ("[t]here is, of course, a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted") (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S.Ct. 139; 73 Am.Jur.2d Statutes Secs. 357-369); *State v. McGlone*, 96 N.H. 448, 450, 78 A.2d 528 (1951) ("It is a general rule of statutory construction that statutes are not intended to have any extraterritorial effect") (citing *Merrill v. Boston*, 63 N.H. 259, 265, 1884 WL 3559 (N.H. 1884) and *Ross v. Eaton*, 90 N.H. 271, 272, 6 A.2d 762); *Tattis v. Karthans*, 215 So.2d 685, 689-90 (Miss. 1968); *Burns v. Rozen*, 201 So.2d 629, 630-631 (Fla.App. 1967); *Dur-Ite Co. v. Industrial Commission*, 394 Ill. 338, 348, 68 N.E.2d 717 (Ill. 1946).

Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex.1968) (quoting 50 Am.Jur. 510, Statutes sec. 487).

The Washington Consumer Protection Act (WCPA) should be read in light of the presumption against extraterritorial application. The statute reads that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. The express terms of the WCPA do *not* contain a clear expression of intent to apply extraterritorially. In fact, statutory definitions of "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting *the people of the state of Washington*" suggests the WCPA is concerned with protecting *Washington* residents. RCW 19.86.010 (emphasis added). But more precisely—and more importantly, for purposes of this case—the WCPA contains no clear expression of intent to apply to citizens of the other 49 states who suffer alleged harm from conduct taking place in the other 49 states.

The presumption against extraterritorial application of a state statute should preclude WCPA claims made by citizens residing in California when the alleged harm was actualized in California. The ruling of the Court of Appeals, however, wrongly disregarded this canon. It mistakenly allowed for extraterritorial application of the CPA to non-

Washington class members who have alleged harm actualized outside of Washington State. *See Schnall*, 139 Wn.App. at 294.

Particularly insightful are two cases from other jurisdictions where courts declined to apply their states' consumer protection laws to alleged harmful conduct in other states based on the presumption against extraterritoriality. In *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal.App.4th 214, 85 Cal.Rptr.2d 18 (2000), the California Court of Appeals considered the claims of a class of mortgagors who asserted claims against mortgagees for unfair business practice under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code Sec 17200, *et seq*. In its analysis, the California Court divided the class of mortgagors into three categories: (1) California residents allegedly harmed regardless of where the mortgagee conduct occurred; (2) non-California residents allegedly harmed by mortgagee conduct in California; *and* (3) non-California residents allegedly harmed by mortgagee conduct occurring in states other than California. 72 Cal.App.4th at 222. The Court then analyzed the UCL claims of the three categories of mortgagor class members in light of the presumption against extraterritorial application of state law. It concluded that the first and second categories of mortgagor class members could properly assert UCL claims. 72 Cal.App.4th at 222. But it *rejected* the claims of the mortgagor class members who were non-

California residents alleging harm from conduct taking place outside state boundaries:

> The UCL bans unfair business practices .... However, it contains no express declaration that it was designed or intended to regulate claims of non-residents arising from conduct occurring entirely outside of California. Plaintiffs do not cite any pertinent California authority construing the UCL as applicable to claims of non-California residents injured by conduct occurring beyond California's borders.

72 Cal.App.4th at 222-223.

There are significant similarities between *Norwest Mortgage* and the present case. Both cases involve non-resident plaintiff class members asserting state consumer protection claims for alleged harm suffered from conduct taking place outside of the respective state boundaries. California resident respondent class members in this case who allege harm from conduct by appellant AT&T Wireless for conduct undertaken in California are in a position analogous to the third category of mortgagee class members in *Norwest Mortgage*. Application of the analysis in *Norwest Mortgage* to the present case would result in dismissal of the CAP claims asserted by respondent California resident class members based on the presumption against extraterritoriality.

In its ruling in *Norwest Mortgage*, the California Court stated that "[t]he only relevant authority from other jurisdictions of which we are aware concluded that a state consumer protection statute analogous to the

UCL does not apply to claims arising solely from extraterritorial conduct." 72 Cal.App.4th at 223 (citing *Consumer Protection v. Outdoor World*, 91 Md.App. 275, 603 A.2d 1376 (1992). The *Outdoor World* case is likewise instructive for its recognition of the presumption against extraterritorial application of state statutes in the consumer protection context.

In *Outdoor World*, the Special Court of Appeals of Maryland considered two categories of unfair and deceptive trade practice claims made by the Maryland Attorney General against a Pennsylvania corporation: (1) sending misleading solicitations into Maryland, inducing Maryland residents to travel to campgrounds outside of Maryland; and (2) pressure sales tactics made once consumers reach the campgrounds in other states. 91 Md.App. at 280. *See* Md. Code Ann., Com. Law, secs. 13-303-305. In considering the claims raised under Maryland's State Consumer Protection Act, the Maryland Court construed the statute according to the presumption against extraterritorial application. *See* 91 Md.App. at 287 ("as a general rule, one State cannot regulate activity occurring in another State, and that, in deference to that principle, regulatory statutes are generally construed as not having extra-territorial effect unless a contrary legislative intent is expressly stated"). The Maryland court held that, by its construction of the statute, the Maryland Attorney General

> has no authority, directly, to preclude sales practices that occur entirely within other States. If Pennsylvania and Virginia wish to permit the kinds of high-pressure sales techniques demonstrated in this record, that is their business. Once the consumer makes the decision to visit the campground and travels to the out-of-State location, he or she must look to the law there for protection.... To the extent that the order ... purports to exercise direct control over conduct occurring entirely outside the State, it is invalid.

91 Md.App. at 1383.

Although *Norwest Mortgage* is more analogous to the present case, *Outdoor World* is nonetheless suggestive of how this court should construe its consumer protection statute in regards to conduct taking place outside its territory. The presumption against extraterritoriality, as applied by the Maryland Court in *Outdoor World*, should be applied by this Court in considering the CPA claims of respondent California resident class members.

Finally, another state's consideration of the presumption against extraterritorial effect of state statutes in a state antitrust case is also insightful. In *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 50 Tex. Sup. Ct.J. 21 (2006), the Texas Supreme Court considered claims raised by several soft drink bottlers in a four-state region under the Texas

Free Enterprise and Antitrust Act of 1983 (TFEAA).[3] The bottlers alleged that Coca-Cola Company and several soft drink distributors in the same region had entered into certain calendar marketing agreements with retailers that unreasonably restrain trade and monopolize the market in that region. 218 S.W.3d at 674. Analyzing the scope of the TFEAA in *Harmar*, the Texas Supreme Court declared: "[w]e start with the principle that a statute will not be given extraterritorial effect by implication but only when such intent is clear." 218 S.W.3d at 683.

The Texas Supreme Court observed that "[i]t is an especially sensitive matter for a jurisdiction to extend its laws governing economic competition beyond its borders" because "[s]uch laws necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another." 218 S.W.3d at 680-681. Based on the presumption against extraterritorial application of state statutes, it concluded that "as a matter of statutory construction, that the Legislature did not intend for the Act to be enforced as it has been here—that is, by awarding damages and injunctive relief for injury that occurred in other states." 218 S.W. 3d at 682.

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[3] In H*armar*, the Texas Supreme Court also declined to entertain the soft drink bottlers' claims under Arkansas, Louisiana, and Oklahoma antitrust law for alleged harmful effects outside Texas, concluding that "when the forum court must determine policies that broadly impact the public of another state in order to

Whereas the TFEAA involved "economic competition" by prohibiting restraints of trade and monopolies, "Washington's Consumer Protection Act was enacted to promote free competition in the marketplace for the ultimate benefit of the consumer." *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 684, 911 P.2d 1301 (1996). Regardless of differences between state antitrust and state consumer protection, both implicate state policy judgments about economic activities and consumer welfare. Accordingly, this Court should find the Texas Supreme Court's invocation of the presumption against extraterritorial application in *Harmar* to be persuasive in construing the WCPA.

As a matter of statutory construction, the Court of Appeals erred by failing to apply the presumption against extraterritoriality when applying the WCPA, thereby allowing respondent class members residing in California allegedly suffering harm actualized in California. The presumption against extraterritoriality as will be discussed below, is also consistent with and bolstered by constitutional concerns of due process, as well as federalism and state sovereignty.

B. Due Process Principles Precludes Non-Washington Resident WPCA Claims for Harms Suffered by Conduct Taking Place

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adjudicate rights under that state's statutes, interstate comity is protected by abstention, not enforcement." 218 S.W.3d at 686.

Outside State of Washington

Constitutional due process principles place important constraints on the ability of one state to impose its own law on the other 49 states through nationwide class actions. The U.S. Supreme Court addressed the due process dimension of nationwide class action lawsuits based on state law claims in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985). The Washington Supreme Court expressly recognized due process limits to WCPA class action claims in *Pickett v. Holland America Line-Westours, Inc.*, 145 Wash.2d 178, 198, 35 P.3d 351(2001) (*citing Shutts*, 472 U.S. 797 and acknowledging that "the United States Constitution puts limits on the application of state law to national class action lawsuits").

Older cases from the U.S. Supreme Court also observe the due process implications of state attempts to extraterritorially regulate property interests or contractual relationships. For instance, in the seminal case of *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338 (1930), the Supreme Court considered a state statutory provision voiding insurance contract's limitation-of-action clauses. The assignee of an insurance policy, which was originally issued in Mexico, by a Mexican insurer, to a Mexican citizen, restricting coverage to Mexican waters—the country in whose waters the loss occurred. The assignee brought suit in Texas against a

New York insurer. Analyzing the extraterritorial construction and application of the law in light of the underlying personal property at stake, the Supreme Court in *Dick* concluded that:

> The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. ... But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. ... Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.

281 U.S. at 407-408 (cites omitted). *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310 n.12, 101 S.Ct. 633 (1981) ("[t]here would be no jurisdiction in the Texas courts to entertain such a lawsuit today") (analyzing *Dick*, 281 U.S. at 402).

Also, in *New York Life Ins. Co. v. Head*, 234 U.S. 149, 34 S.Ct. 879 (1914), the Supreme Court considered a Missouri statute said to prohibit the modification of a loan agreement by a citizen of New Mexico and a citizen of New York simply because the agreement was originally contracted in Missouri. The Court concluded:

> ... it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of

> New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.

234 U.S. at 161. The Supreme Court went on to assert that "decisions of this court affirmatively establish[] that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." 234 U.S. at 162 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427 (1897)).

Similarly, due process of law would be offended if this Court were to allow the CPA to be applied to non-Washington residents based on alleged harm from conduct taking place outside of Washington. For this reason, the Court of Appeals decision was in error.[4]

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[4] Even in the absence of U.S Supreme Court jurisprudence recognizing constitutional due process limits on extraterritorial application of state statutes, due process protections might also be independently found in the Washington Constitution's due process clause. WASH. CONST. Art. I. sec. 3. Amici recognizes that decisions by this Court have held that "the Washington Constitution provides equal, but not greater due process protection" than the Fourteenth Amendment's Due Process Clause. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 217 n.2, 143 P.3d 571 (2006) (citing *In re Personal Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Nonetheless, *Amici* respectfully suggests this Court be open to reconsidering the meaning of the Washington Constitution's Due Process Clause, if necessary to decide the present case.

C. Principles of Federalism and State Sovereignty Preclude Non-Washington Resident WPCA Claims for Harms Suffered by Conduct Taking Place Outside State of Washington

Limits on extraterritorial reach of state laws are also consistent with constitutional federalism and state sovereignty. Federalism's principle of state equality prohibits overreaching state laws and is generally addressed through a variety of federal constitutional provisions.[5]

State equality is also embodied in the equal footing doctrine. *In re Tortorelli*, 149 Wn.2d 82, 91, 66 P.3d 606 (2003) ("[u]nder the equal footing doctrine, states subsequently admitted to the Union obtained 'the same rights, sovereignty and jurisdiction ... as the original States possess

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[5] *See, e.g.*, U.S. CONST. Art. I, sec. 3 (amended) ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote"); U.S. CONST. Art. IV, sec. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof"); U.S. CONST. Art. IV, sec. 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"); U.S. CONST. Art. IV, sec. 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence"). *See also* The Federalist No. 62, at 378 (A. HAMILTON or J. MADISON) (Clinton Rossiter ed., 1961). ("[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."); The Federalist No. 42, at 267 (J. MADISON) (Clinton Rossiter ed., 1961). ("The powers included in the THIRD class are those which provide for the harmony and proper intercourse among the States. include[d] the particular restraints imposed on the authority of the States,.... and... prescribe the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads.")

within their respective borders'") (quoting *Mumford v. Wardwell,* 73 U.S. 423, 436, 18 L.Ed. 756 (1867)). Constitutional federalism's guarantee of state equality limits the ability of one state to impose its own law on the other 49 states. As the Supreme Court has declared, "[n]o State can legislative except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 14 Otto 592 (1881) (quoted in *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 571, 116 S.Ct. 1589 (1996)).[6] State equality guarantees that each state can exercise its sovereignty within its respective boundary.

A hallmark of state sovereignty is the rightful exercise of police powers. States have traditionally exercised their police powers in the area of consumer protection. *See, e.g., American Consumer Pub. Ass'n, Inc. v.*

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[6] Not addressed here are limits upon extraterritorial application of state legislation based upon the U.S. Supreme Court's "dormant" Commerce Clause jurisprudence. *See* U.S. CONST. Art I. sec 8, cl. 3 ("[Congress shall have the power]...[t]o regulate Commerce ... among the several States"); *Dept. of Rev. of Ky. v. Davis*, ___ U.S. ___, 128 S.Ct. 1801, 1808 (2008) (describing dormant Commerce Clause jurisprudence, which includes a virtual per se prohibition of laws discriminating against interstate commerce). This jurisprudence limits, for example, the ability of states to exercise extraterritorial taxation. *See, e.g., ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315, 102 S.Ct. 3103 (1982) ("As a general principle, a State may not tax value earned outside its borders"). This Court has had occasion to consider dormant commerce clause limits to extraterritorial of state legislation. *See, e.g., Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 48, 156 P.3d 185 (2007) (observing that ["[a] state tax on interstate commerce does not violate the commerce clause so long as 'the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State'" (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, (1977)), cert

Margosian, 349 F.3d 1122, 1131 n.12 (9th Cir. 2003) ("Consumer protection is a 'matter firmly committed to the states' under their police powers") (quoting *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661 (1989)). As the Washington Supreme Court has similarly recognized, "[t]he police power of this state may be exercised by the legislature quite appropriately in relation to the interest of the consuming public." *State v. 28 Containers of Thick and Frosty*, 82 Wn.2d 722, 731, 514 P.2d 140 (1973).

From federalism's principle of state equality it follows that states should be able to protect their own citizen consumers in the best manner they deem fit, but that states should not be able to dictate terms for how other states protect their own citizen consumers. In *Harmar*, the Texas Supreme Court astutely observed in *dicta* that:

> The principle of federalism that requires states to respect each others' divergent laws on the former type of conduct, even when there is stronger consensus about its effects, is especially compelling when only the latter type of conduct is involved and there is wide room to disagree. One state's legislature cannot dictate to other states what can and cannot be tolerated in economic competition. This is "so obviously the necessary result" that it needs no supporting authority.

218 S.W. 3d at 681-82. The Texas Supreme Court went on to rhetorically

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denied, 128 S.Ct. 1224, 170 L.Ed.2d 61 (2008); *State v. Heckel*, 143 Wn.2d 824,

ask why it should supplant the laws of other states about how to best protect consumers from conduct and injury in those states, concluding that "[t]here is no good answer." *Harmar*, 218 S.W.3d at 681. That court's respect for our federal system echoed a similar observation from the U.S. Supreme Court. *See F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165-166, 124 S.Ct. 2359 (2004) (quoted in *Harmar*, 218 S.W. 3d at 681). The concerns of federalism raised in *Harmar* and *Empagran* should be considered in the present case.

Under federalism's principle of state equality, the Washington legislature should rightfully expect its policy choices about how to protect Washington residents will be respected through judgments made by this Court. This Court does, in fact, consider legislative "public interest" pronouncements to conclusively define *per se* violations of the "public interest" element needed to establish WCPA violations. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 791-792, 719 P.2d 531 (1986).

Under federalism's principle of state equality, the Washington legislature should also rightfully expect that its consumer protection policies cannot be supplanted by the extraterritorial application of a sister state's laws to Washington consumers. This Court has expressly declined

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837-840, 24 P.3d 404 (2001).

to follow the decisions of other courts consumer protection decisions on the grounds that Washington's public policies for protecting consumers should prevail. In *McKee v. AT&T Corp.*, the plaintiff was a Washington resident and the terms of his contract specified New York law in the choice-of-law provision. This Court held that:

> We disregard the contract provision and apply Washington law if, without the provision, Washington law would apply; if the chosen state's law violates a fundamental public policy of Washington; and if Washington's interest in the determination of the issue materially outweighs the chosen state's interest.

(citing *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 694-695, 167 P.3d 1112 (2007) (citing *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685, 586 P.2d 830 (1978) (quoting Restatement (Second) of Conflicts of Laws, Sec. 187 (1971)). This Court concluded that all three criteria were met, with a specific holding that chosen state's law, New York, violated the WCPA fundamental public policy of allowing class action suits. *McKee,* 191 P.3d at 851-852.

But under federalism's principle of state equality, neither the Washington legislature's ability to protect its own residents nor this Court's refusal to follow the laws of other states that are contrary to Washington public policy should supplant consumer protection laws and policies in other states. In the present case, this Court should respect the

ability of California to make its own determination of how to best protect its consumers by reversing the Court of Appeals' ruling allowing for extraterritorial application of the WPCA to respondent class members who are California residents raising claims based on alleged harm actualized in California.

V. CONCLUSION

For the foregoing reasons, *amicus curiae* American Legislative Exchange Council urges the Court to reverse the ruling of the Court of Appeals.

RESPECTFULLY SUBMITTED this 26th day of September, 2008.

By: Seth Cooper

Seth L. Cooper, WSBA No. 34597
Micah L. Balasbas, WSBA No. 40235

FILED AS
ATTACHMENT TO EMAIL

CERTIFICATE OF SERVICE

I, Seth L. Cooper declare and state as follows:

1. I am over the age of eighteen and competent to testify to the matters herein.

2. I am an attorney at law. My business and mailing address is: 1101 Vermont Ave, NW, Washington, DC 20005

3. On September 26, 2008, I caused to be served a copy of the ***AMICUS CURIAE* BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL** on the following, per the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Washington, D.C., this 26th day of September, 2008.

Seth Cooper
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